TANIA SCIVETTI (PEMILIK TUNGGAL, MESSRS SCIVETTI & ASSOCIATES) v. MAJLIS PEGUAM & ORS

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
GUNALAN MUNIANDY JCA
AZIMAH OMAR JCA
[CIVIL APPEAL NO: W-02(A)-2280-12-2021]
29 MARCH 2023

Abstract – *The court may appropriately grant a declaration, as to the jurisdiction of the Disciplinary Committee ('DC') to determine the correctness of the Disciplinary Board's ('DB') findings on the DC's jurisdiction, prior to the DC's hearing. A declaration regarding the DB's decision would be sufficiently flexible and not unduly intrusive as to disturb the adjudicative functions of either the DB or the DC. In the ordinary course of events, the courts should not interfere with the statutory mechanisms of the Legal Profession Act 1976 in determining the merits of a complaint. However, where the DC has conducted itself in a manner that has divested itself of jurisdiction over the matter, it would be more practicable for the parties to seek a declaration from the court rather than requiring the DC to hold a full-fledged hearing on the issue of jurisdiction when the DB has already decided on the matter.*

LEGAL PROFESSION: *Advocates and solicitors – Complaint – Complaint lodged with Bar Council against advocate and solicitor – Wrongfully instructing legal clerk not registered as solicitor with Bar Council to represent client in hearing – Disciplinary Board informed advocate and solicitor that Disciplinary Committee had been appointed to inquire into complaint – Inquiry embarked four years and one month later – Preliminary objection regarding time limitations – Whether there was contravention – Legal Profession Act 1976, ss. 99(3A), 103B(1) & 103EA*

CIVIL PROCEDURE: *Originating summons – Reliefs – Injunctive and declaratory reliefs – Complaint lodged with Bar Council against advocate and solicitor – Wrongfully instructing legal clerk not registered as solicitor with Bar Council to represent client in hearing – Disciplinary Board ('DB') informed advocate and solicitor that Disciplinary Committee ('DC') had been appointed to inquire into complaint – DC embarked on inquiry four years and one month later – DB dismissed preliminary objection on time limitation and directed DC to proceed with inquiry – Advocate and solicitors sought injunctive and declaratory reliefs to declare DC's inquiry unlawful and to restrain DC from proceeding with inquiry – Whether originating summons premature – Whether proper for court to grant extensive injunctive relief to interfere with adjudicative authority and function of DC ahead of DC's hearing*

The appellant was an advocate and solicitor, the sole proprietor of Messrs Scivetti & Associates ('firm') and a member of the first respondent ('Bar Council'). A complaint was lodged with the Bar Council, against the appellant, alleging that the firm had wrongfully instructed its legal clerk, who was not a registered solicitor with the Bar Council, to represent its client in a hearing. The second respondent, the Disciplinary Board ('DB'), then informed the appellant that the third respondent, the Disciplinary Committee ('DC'), had been appointed to further inquire into the said complaint. However, it was only four years and one month later that the DC embarked on the inquiry into the complaint, seeking a written explanation from the appellant. The appellant raised a preliminary objection, pursuant to s. 103EA of the Legal Profession Act 1976 ('LPA'), regarding the time limitations under ss. 103B(1) and 99(3A) of the LPA. The DB dismissed the appellant's preliminary objection and directed the DC to proceed with further inquiry. Notwithstanding the appellant's preliminary objections, the DC insisted on proceeding with the inquiry and notified that a hearing before the DC shall be conducted. This prompted the appellant to file an originating summons ('OS') at the High Court, for injunctive and declaratory reliefs to declare the DC's inquiry unlawful and to restrain the DC from proceeding with the inquiry. The High Court Judge ('HCJ') dismissed the OS on the grounds that: (i) the OS was premature and it was improper for the court to grant extensive injunctive reliefs to interfere with the adjudicative authority and function of the DC ahead of the DC's hearing; (ii) the appellant's reliance on s. 99(3A) of the LPA was misplaced and a non-issue as the requisite inquiry under the provision was specifically referring to the DB's (not the DC's) inquiry under s. 100 of the LPA, which the DB had already complied with within time; and (iii) although there was a clear contravention of s. 103B of the LPA, it remained improper for the court to permanently injunct the DC from performing its adjudicative function. Hence, the present appeal.

Held (allowing appeal)
Per Azimah Omar JCA delivering the judgment of the court:

(1) The HCJ's refusal to grant the declaratory reliefs, on the basis of the OS being premature, was misguided. Although the HCJ had in mind the appropriate caution, His Lordship failed to consider other prevailing principles in the granting of declaratory reliefs and other salient facts of the OS which would put the OS within the realm of the exception to the general rule of non-intervention. A declaration as to the jurisdiction of the DC could appropriately be sought before the court to determine the correctness of the DB's findings regarding the DC's jurisdiction before the DC's hearing. A declaration regarding the DB's decision would be flexible enough and not so intrusive to disturb the adjudicative functions of either the DB or the DC. In normal circumstances of a determination of merit of a complaint, the courts ought not to interfere with the full

realisation of the statutory mechanisms of the LPA. However, when the DC had conducted itself in a manner that relinquished its jurisdiction over the matter, it would be entirely more practicable for parties to seek for a declaration from the court instead of wasting resources just so that the DC would have to decide on its jurisdiction in a full-fledged hearing when the DB had already decided on the same matter of jurisdiction. Considering the DB had already affirmed the DC's jurisdiction, it was highly unlikely that the DC would depart from the DB's determination as the DC itself was already insisting on its jurisdiction to proceed with the DC's hearing. Thus, rather than proceeding with months of the DC's hearing while risking a negative finding of jurisdiction, it was far more practical that the court determines the validity of the DB's decision as to the DC's jurisdiction. (paras 24, 25, 27 & 34)

(2) Section 99(3A) of the LPA specifically refers to and limits the act of inquiry by the DB and not the act of lodging complaints. The provision expressly states that the DB shall not inquire into any complaints if six years had already passed since the accrual of the right to action. Thus, any supposition that goes against the clear pronouncement should be in contravention of the provision. Section 99(3A) of the LPA was a non-issue as the DB's request to seek for a written explanation under s. 100 of the LPA, in 2016, was well within the limitation period of the provision. The DB's inquiry under the provision was separate and distinct to the DC's inquiry, which the DC had called for in 2021. (paras 39 & 45)

(3) The four years' long unexplained delay had put the appellant in a long state of limbo and distress over the firm's uncertain fate; it was only fair and just that the appellant not be put in a prolonged state of suspense and dragged through years of uncertainty. Considering the nature of the appellant's practice as a law firm, it was only just for the appellant to be given prompt opportunity to defend the firm's reputation and integrity. It was also in the best interest of the appellant's clients and prospective clients to know, with certainty, the reputation and integrity of the solicitors they have appointed or intend to appoint. The HCJ had already found that the DC's delay was inordinate and inexplicable and that it would be a cogent ground for the appellant to contend on the time lapse under s. 103B of the LPA. However, despite the above finding, the HCJ still refused to allow any injunctive or even declaratory reliefs to the appellant on the same ground of premature action. Therefore, the HCJ fell into error in failing to outright declare the clear breach of s. 103B of the LPA by the DC and the unlawfulness of the DC's inquiry for being four years and one month out of time. (paras 51-53 & 56)

(4) The entirety of the HCJ's decision to dismiss the appellant's OS was set aside. The act of convening an inquiry by the DC was illegal, void and of no effect as there had been a breach of s. 103B(1) of the LPA. The disciplinary proceedings instituted by the DB against the plaintiff were therefore illegal, null and void. (para 57)

Case(s) referred to:

Cheah Foong Chiew v. Lembaga Jurutera Malaysia [1999] 3 CLJ 242 CA ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Koh Mui Tee v. Chin Lee & Ors And Another Appeal [2014] 1 LNS 966 CA ***(dist)***

Majlis Peguam Malaysia & Ors v. Joseph Au Kong Weng [1993] 2 CLJ 417 SC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Sumbangan Aneka Sdn Bhd v. KNK Development Sdn Bhd & Ors [2021] 7 CLJ 694 FC ***(refd)***

Sundarajan Sokalingam v. Fredrick Indran XA Nicholas; Badan Peguam Malaysia (Intervener) [2015] 4 CLJ 892 CA ***(refd)***

Tetuan Choong & Co & Ors v. Lembaga Tatatertib Peguam-Peguam [2004] 1 CLJ 574 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 47, 93, 99(3A), 100, 103A, 103B(1), 103EA, 103F

Legal Profession (Disciplinary Proceedings) Rules 2017, r. 6

For the appellant - Muhammad Shafee Abdullah, Effa Azuin Aidrul Hisham, Alaistair Brandah Norman & Hartrisha Kaur Sandhu; M/s Scivetti & Assocs

For the 1st respondent - Ringo Low Kim Leng & Melvin Chonh Jia Shern; M/s Ringo Low & Assocs

For the 2nd & 3rd respondents - Keshvinjeet Singh; M/s Gunaseelan & Assocs

[Editor's note: For the High Court judgment, please see Tania Scivetti v. Majlis Peguam & Ors [2022] 3 CLJ 728 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azimah Omar JCA:

Background Facts

[1] The appeal before us concerns the appellant-plaintiff's originating summons for an injunction and declaratory reliefs to restrain the respondents (particularly the third respondent) from proceeding with a further disciplinary inquiry primarily in reliance of s. 103B(1) and s. 99(3A) of the Legal Profession Act 1976 ("LPA").

[2] The appellant contended that the third respondent was at least four years and one month out of time (since the appointment of the third respondent by the second respondent in 2016) to commence a further inquiry into a complaint lodged against the appellant.

[3] Nonetheless, during the appeal hearing before us on 29 March 2023, the appellant-plaintiff only proceeded to seek the declaratory reliefs sought *vide* the originating summons. Thus, we are minded to address and deliberate upon the present appeal only to the extent of the propriety of the declarations applied for, and not the injunctive relief previously applied for to restrain the adjudicative functions of the third respondent.

[4] We are also minded to note that the present appeal does not at all deal with the actual merits of the alleged misconduct complained against the appellant. Instead, the present appeal only revolves around the appellant's procedural objection against the third respondent's inquiry which the appellant contended to have been made out of time in contravention of s. 103B(1) and s. 99(3A) of the LPA. Thus, we are also minded to not delve into the substantive merits of the complaint and limit our appellate intervention to the scope of the curial or procedural law involved in the appellant's objections. In any case, it is apt for us to briefly lay down the background facts which led to the appellant's objections under its originating summons.

[5] Tania Scivetti ("the plaintiff/appellant") is an advocate and solicitor of the High Court of Malaya and the sole proprietor of the firm, Messrs Scivetti & Associates. The plaintiff is also a member of the Bar Council ("the first defendant/first respondent").

[6] As mentioned in the above paragraph, the first respondent is the Bar Council. The first respondent is the Bar Council of Malaysia established under s. 47 of the LPA for the primary purpose of managing the affairs of the Malaysian Bar and performance of the functions of the Malaysian Bar under the LPA.

[7] The second respondent is the Disciplinary Board ("second respondent/DB") established under s. 93 of the LPA to exercise the functions of the Bar Council for the purposes of disciplinary proceedings primarily under Part VII of the LPA.

[8] The third respondent is the Disciplinary Committee ("third respondent/DC") which from time to time will be appointed by the second respondent under s. 103A of the LPA in circumstances where the DB deems that a DC is necessary to be appointed to further inquire into a complaint lodged against a solicitor.

[9] Succinctly, a complaint was lodged against the appellant alleging that the firm had wrongfully instructed the firm's legal clerk (not a registered solicitor with the Bar Council), one Muhammad Akbar bin Abdul Gafoor ("En Akbar") to represent its client, one Azman bin Bahari ("the client"), in a hearing on 4 November 2014 under Dangerous Drugs (Special Preventive Measures) Act 1985 at the Pusat Pemulihan Akhlak Batu Gajah, Perak ("the impugned hearing").

[10] The appellant however, contended that En Akbar was in attendance with another two solicitors from the firm (Syazwani binti Mohd Zawawi and Nor Rabiatul binti Bahari) only in the capacity to assist these two solicitors who were actually instructed to represent the client and take conduct of the proceedings during the impugned hearing.

[11] A concise chronology of the series of correspondences of the events had astutely been prepared by the learned High Court Judge ("learned judge") who disposed of the appellant's originating summons. We reproduced the same here for ease of reference: para. 78 of the learned judge's grounds of judgment.

(i) on 4 November 2014, the hearing before the advisory board of Prime Minister took place;

(ii) on 19 December 2014, an email by Puan Ida seeking clarification or confirmation of possession of practicing certification;

(iii) on 24 December 2014, the Bar Council replied to Puan Ida that Encik Akbar does not have a record with the Bar Council;

(iv) on 21 July 2015, a fetter from the first defendant to the plaintiff seeking explanation on the legal representation by Encik Akbar;

(v) on 10 August 2015, an explanation given by the plaintiff to the first defendant;

(vi) on 14 December 2015, a letter entitled "Complaint by Bar Council against Tania Scivetti (of Messrs Scivetti & Associates) ("respondent")" from the first defendant to the second defendant;

(vii) on 16 March 2016, a letter from the second defendant to the plaintiff seeking written explanation about the first defendant's letter dated 14 December 2015 encapsulated incident of legal representation by Encik Akbar on 4 November 2014;

(viii) on 28 March 2016, the plaintiff replied to the second defendant;

(ix) on 12 May 2016, the first defendant informed the second defendant that the explanation given by the plaintiff was unsatisfactory and requested the second defendant to proceed with the investigation;

(x) on 14 September 2016, the second defendant suggested for summary hearing;

(xi) on 23 September 2016, the plaintiff disagreed with the summary hearing; and

(xii) on 31 October 2016, second defendant informed that a Disciplinary Committee shall be appointed.

[12] The DB then had *via* a letter dated 27 December 2016 informed the appellant that a DC had been appointed to further inquire into the complaint lodged against the appellant.

[13] Thereafter, four years and one month then had passed without any development since the DB informed the appellant of the appointment of the DC to further inquire into the complaint lodged against the appellant. Only after a whopping four years and one month that the chairperson of the DC had embarked on the DC's inquiry into the complaint against the appellant *via* a letter dated 21 January 2021 seeking for a written explanation from the appellant.

[14] In view of the years of alleged inordinate delay in the DC's inquiry, the appellant *via* its letter dated 29 January 2021, has raised a preliminary objection under s. 103EA of the LPA regarding the time limitations under s. 103B(1) and s. 99(3A) of the LPA. The DB on 4 March 2021 had dismissed the appellant's preliminary objections and directed the DC to proceed with further inquiry. Notwithstanding the appellant's preliminary objections, the DC remained insistent to proceed with its inquiry and notified that a hearing before the DC shall be conducted on 19 April 2021.

[15] It was the DC's insistence to proceed with the DC inquiry out of time that had led the appellant to file an originating summons on 6 April 2021 for injunctive and declaratory reliefs to declare the DC's inquiry to be unlawful and to also restrain the DC from proceeding with the inquiry (including the hearing slated to be conducted on 19 April 2021) ("the OS").

[16] Pending the full disposal of the OS at the High Court, the learned judge on 13 April 2021 had granted an interim stay on the DC's hearing.

The High Court's Findings

[17] Upon hearing the OS, the learned judge had dismissed the OS on the following grounds:

(i) the appellant's OS was premature and it was improper for the court to grant extensive injunctive relief to interfere with the adjudicative authority and function of the DC ahead of the DC's hearing:

> **Paragraphs [59], [60], [62], [63], [66] and [67] of the Learned Judge's Grounds of Judgment.**
>
> [59] In *Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [1999] 3 MLJ 110; [1999] 1 MLRA 316; [1999] 3 CLJ 242; [1999] 2 AMR 2421, the Appellant was charged under the Registration of Engineers Rules 1972. Before the disciplinary proceedings could commence, the Appellant applied to the court to challenge the jurisdiction of the Respondent to bring the charge against him. The issue was whether, on the facts, the court ought to intervene.
>
> [60] Shaik Daud JCA (as he then was) stated that the Appellant's application to the court, in the circumstances of the case, is premature. His Lordship stated that it would be wrong for the courts to intervene at this stage as it would be tantamount to

restraining the Respondent from hearing the charge against the Appellant, and would pre-empt the Respondent's right under the law to adjudicate the matter. His Lordship was also of the view that the learned judge was right when he said that it was premature for the court to injunct the Respondent in exercising their powers.

…

[62] The principle in *Cheah Foong Chiew* (*supra*) is followed in the case of *Tetuan Choong & Co & Ors v. Lembaga Tatatertib Peguam-Peguam* [2003] 3 MLRH 703; [2004] 1 CLJ 574; [2004] 1 AMR 575 where the Plaintiffs filed an application to restrain the Disciplinary Committee from hearing a complaint made against them by the Bar Council of Malaysia. Raus Shariff J (as he then was) with clear and succinct wordings stated that: "I am of the view in an application of this nature, the court must consider not only the interests of the advocates and solicitors, but also that of the legal profession as a whole, and above all public interest. It is in the public interest that there be an ethical and disciplined legal profession and indeed the privileged position which the legal profession enjoys by law can only be justified on those grounds. It is for this reason, to ensure that public interest in having a legal profession of the highest possible standard is upheld, Parliament has, in his wisdom set up the scheme of disciplinary proceedings under the Act for the proper discipline of advocates and solicitors.

Thus, taking into consideration the scheme of disciplinary proceedings under the Act, I am of the view that this court must not entertain this type of action. To me, the plaintiffs must exhaust their domestic remedies before coming to this court. All of the plaintiffs' arguments as to the validity of the complaint can and should be raised before the Disciplinary Committee at the hearing of the said complaint. There is an appeal process. The plaintiffs have the right to appeal to the High Court and have a further right to appeal to the Federal Court.

…

[63] In *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80; [1970] 1 MLRA 344; [1970] 2 MLJ 41, the Federal Court affirmed the legal principle that where a statute creates a right and gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others.

…

[66] It is therefore my considered opinion that the court must deal with the application in hand at this juncture with caution as I do not want to be perceived as prematurely interfering with the adjudicative function of Second and Third Defendants.

[67] Following the decided case laws on this issue, I am of the view that the court must not entertain this type of action for a reason the Plaintiff must first exhaust domestic remedies before coming to this Court.

(ii) the appellant's reliance on s. 99(3A) of the LPA was misplaced and a non-issue as the requisite inquiry under the provision was specifically referring to the DB's (not DC's) inquiry under s. 100 of the LPA (which the DB has already complied with within time *via* the DB's inquiry *vide* the DB letter dated 14 December 2015):

Paragraphs [85] and [86] of the Learned Judge's Grounds of Judgment.

[85] The inquiry required under section 99(3A) of the LPA was already embarked on by the Second Defendant on or before its letter dated 16 March 2016 when it requested the Plaintiff to provide a written explanation to the complaint by the First Defendant dated 14 December 2015.

[86] Therefore, I am of the opinion that the issue on the six-year limitation under section 99 (3A) of the LPA is indeed a non-issue in this instant case"; and

(iii) although there is a clear contravention of s. 103B of the LPA, it remains improper for the court to permanently injunct the DC from performing its adjudicative function:

Paragraphs [94], [95] and [96] of the Learned Judge's Grounds of Judgment.

[94] Hence, on the issue of time lapse under section 103B(1) of the LPA, I found that there is a very strong and cogent ground for the Plaintiff as there is no explanation given by the Second and Third Defendants for the inordinate delay. As justice delayed is justice denied, the Second and Third Defendants must make their findings expeditiously.

[95] Nevertheless, I take note that the hearing of disciplinary proceedings has yet to take place. A more important question for me to ask is this: is it justifiable for this Court at this juncture to grant the extensive prayers merely on the issue of time lapse under section 103B of the LPA is more favorable to the Plaintiff?

…

[96] Again, I wish to say that the hearing of disciplinary proceedings has not even started. The Plaintiff has prematurely filed this application to injunct the Second and Third Defendants from performing its adjudicative duty under the legislation. The court must deal with the application in hand at this juncture with caution as I do not want to be perceived as prematurely interfering with the adjudicative function of Second and Third Defendants.

A **The Appeal Before Us**

[18] Dissatisfied with the learned judge's decision, the plaintiff appealed against the learned judge's decision to the Court of Appeal. The appellant's appeal was primarily leveraged on the following grounds:

B (i) the learned judge's finding that the appellant's OS was premature was wrong in law and had ignored the prevailing rule that the existence or availability of statutory remedy is not a bar against the granting of declaratory relief;

(ii) the learned judge has erred in law and in finding that the appellant's
C reliance on the six-year time limitation under s. 99(3A) of the LPA was a non-issue; and

(iii) the learned judge has erred in refusing to declare the unlawfulness of the DC's inquiry out of time although clearly agreeing with the appellant that the DC had clearly contravened s. 103B of the LPA.

D

[19] We have perused the learned judge's grounds of judgment, both parties' written submissions, as well as the appellant's memorandum of appeal and found that the appeal before us can be determined by answering the following three issues:

E (i) issue 1: whether or not the learned judge's refusal to grant the declaratory reliefs on the basis of the OS being premature was correct in law;

(ii) issue 2: whether or not the learned judge's finding that s. 99(3A) of the LPA was a non-issue was correct in law; and

F

(iii) issue 3: whether or not the learned judge's refusal to grant declarations despite his finding of DC's breach of s. 103B of the LPA was correct in law.

Issue 1: Whether Or Not The Learned Judge's Refusal To Grant The Declaratory
G *Reliefs On The Basis Of The OS Being Premature Was Correct In Law*

[20] As we have intimated earlier, during the hearing of the present appeal before us, the appellant has conceded on its prayers for permanent injunction and now only seeks for the declaratory reliefs in prayers 1(g) and (j) of the OS:

H

> *(g) That the act of convening an inquiry by the Third Defendant on the appointment by the Second at this juncture is illegal, void, and of no effect as there has been a breach of mandatory provision of Section 103B(1) of the LPA;*
>
> …
>
> I *(j) That the disciplinary proceedings instituted by the Second Defendant against the Plaintiff were therefore illegal, null, and void.* (emphasis added)

[21] Considering the concession above, it stands to reason that the main reason the learned judge's cautiousness (which is certainly understandable) is by and large no longer warranted as the appellant-plaintiff here is no longer seeking to permanently injunct the respondents but only maintains its application for the two declarations in prayers 1(g) and (j) of the OS. It is certainly trite that the threshold of an injunction is altogether different and much higher than that of a declaration.

[22] It is clear to us that the learned judge's cautiousness as to not intervene with the respondents' adjudicative function was premised on the ground that the learned judge was mindful not to decide on the merits of the complaint before the DC's hearing and decision.

[23] On the contrary, we find that the learned judge was unfortunately in error as the learned judge had failed to consider these three following salient facts in the OS:

(i) firstly, the remedy that the appellant was seeking was not to intervene the adjudicative function of the DC to decide on the merits of the complaint. In fact, the entirety of the appellant's OS was exclusively pertaining to curial laws as to the propriety of the procedural transgressions of the respondents under the LPA. The appellant was not asking the High Court to decide the merit of the complaint ahead of the DB or DC. Thus, the learned judge's reliance on the excerpt of the decision in *Tetuan Choong & Co & Ors v. Lembaga Tatatertib Peguam-peguam* [2004] 1 CLJ 574; [2003] 3 MLRH 703; [2004] 1 AMR 575 is unfortunately misplaced. Raus Sharif J (as His Lordship then was) in that case stated that, "the plaintiffs must exhaust their domestic remedies before coming to this court. All of the plaintiffs' arguments as to the **validity of the complaint** can and should be raised before the Disciplinary Committee at the hearing of the said complaint." (emphasis added). On the other hand, what the appellant is seeking for is a determination on the jurisdiction of the DC considering the DC's inquiry being way out of time (in breach of s. 103B of the LPA);

(ii) furthermore, the appellant indeed had gone through the proper statutory channel to voice its preliminary objection to the DB (which the DB had in fact already decided upon). Thus, although the learned judge has considered a correct rule of law, the learned judge has incorrectly applied the rule of law onto the OS as the appellant is not asking the court to decide on the merits of the complaint ahead of the DC's hearing;

(iii) secondly, the declaration sought by the appellant was not a declaration which would be ahead of the determination of the DB or the DC. We reiterate that the preliminary objection had already been raised before and was decided by the DB. The DB had dismissed the appellant's

preliminary objection and already found that the DC still maintained jurisdiction to proceed with the hearing although the inquiry was well out of time. So, the parallel the learned judge drew with the case of *Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [1999] 3 CLJ 242; [1999] 3 MLJ 110; [1999] 1 MLRA 316; [1999] 2 AMR 2421 ("*Cheah Fong Chiew*") is unfortunately misplaced;

(iv) this is because, in the case of *Cheah Foong Chiew*, the challenge upon the jurisdiction of the Board of Engineers was never even heard and was never decided upon. In stark contrast with the OS, the appellant's challenge upon jurisdiction had already been determined and dismissed by the DB. So, there was already a level of commencement of disciplinary proceedings which led to the DB finding that the contraventions of the LPA did not oust the jurisdiction of the DC to proceed for further inquiry;

(v) thirdly, the learned judge's insistence that the appellant should (as a general rule) first exhaust all the statutory mechanisms under the LPA was ignoring the equally pertinent issue of the DC's loss of jurisdiction when the DC had failed to commence its inquiry within the limitation period. We do not intend to contra, and are in fact in agreement with the general rule referred to by the learned judge. As a general rule, if a statute provides statutory mechanisms or remedies, parties should abide by the same and see the matter to the full extent of the same statutory mechanism or remedies. However, we cannot rigidly apply the general rule when the statutory bodies conducted themselves in direct contravention of the very statute that clothed them with statutory jurisdiction;

(vi) this is especially so considering the statutory procedures under the LPA which provide separate levels of inquiries between the DB and the DC. Like in the present appeal, the question arises, should the appellant be expected to see to the end of the DC's hearing, when in between the DB inquiry and the DC inquiry, the DC had conducted itself in a manner that has relinquished the DC's jurisdiction over the matter?

[24] To answer the above question, we are inclined to agree with the position adopted by the appellant. We agree that a declaration as to the jurisdiction of the DC can appropriately be sought before the court to determine the correctness of the DB's findings regarding the DC's jurisdiction before the DC's hearing. A declaration regarding the DB's decision would be flexible enough and not so intrusive to disturb the adjudicative functions of either the DB or the DC.

[25] In normal circumstances of a determination of merit of a complaint, of course the courts ought not to interfere with the full realisation of the statutory mechanisms of the LPA. But when the DC had conducted itself in

a manner that relinquishes its jurisdiction over the matter, it would be entirely more practicable for parties to seek for a declaration from the court instead of wasting resources just so that the DC would have to decide on its jurisdiction in a full-fledged hearing when the DB has already decided on the same matter of jurisdiction.

[26] There is validity in the point raised by learned counsel for the appellant in the futility of such, exercise, considering the fact that the 'umbrella' body (being the DB) had already decided on the DC's jurisdiction prior to the DC's hearing.

[27] Considering the DB had already affirmed the DC's jurisdiction, it is highly unlikely that the DC would depart from the DB's determination considering the DC itself also was already insisting on its jurisdiction to proceed with the DC's hearing. Thus, rather than proceeding with months of DC's hearing while risking a negative finding of jurisdiction, it is far more practical that the court determines the validity of the DB's decision as to the DC's jurisdiction.

[28] The declaration would shed much needed clarity and certainty on how parties ought to conduct the matter moving forward. In this manner, the court would not be interfering with the adjudicative functions of the DB and DC by way of injunction but the court would be able to make practical and meaningful declarations as to the jurisdiction of the DC in view of the DC's statutory breaches.

[29] We agree with the appellant's reliance on the principle that the availability of a statutory mechanism is no bar to a declaration. We refer to the salutary words of Suffian LP (as His Lordship then was) in the case of *Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101:

> In *Ruislip-Northwood UDC v. Lee* (1931) 145 LT 208 214 plaintiff sought the ruling of the court on a definite, concrete and existing dispute. *The fact that the declaration was sought before the statutory powers were exercised was not a consideration weighing against the grant of that declaration. Nowadays, the courts seldom refuse to make orders on ground that it is premature to consider the question.* As Greer LJ pointed out that it had been for years the practice to know and determine claims for declaration of rights where there was a real and not a fictitious or academic question involved in order that the parties might know what course to take without running the risk of finding themselves liable to damages. *Indeed, we consider that a court should make it possible to settle real disputes immediately they arose, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future.* (emphasis added)

[30] We also draw guidance from the Federal Court decision in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 ("*Sri Lempah*") which had held the following:

> In the first place it must be made clear that the *existence of a statutory remedy is no bar to an action for a declaration.* This case falls within the *general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies to an action for a declaration.* (emphasis added)

[31] The decision in *Sri Lempah* was recently upheld and restated in another Federal Court decision in the case of *Sumbangan Aneka Sdn Bhd v. KNK Development Sdn Bhd & Ors* [2021] 7 CLJ 694.

[32] It must be highlighted that it is never our intention to override the general rule that a litigant must necessarily exhaust a statutory remedy or mechanism before presenting his disgruntlement before the court. The court should always tread carefully and lightly so as to not usurp any statutory body which was clothed with jurisdiction under a statute. Nonetheless, at least specifically to the unique circumstances of the present appeal, (considering the fact that the DB had already made a decision on the DC's jurisdiction and that the DC allegedly had relinquished its jurisdiction due to its statutory breaches), it is only appropriate for the appellant to seek a declaration from the court not to determine the complaint on its merit, but to identify the appropriate position and rights of the parties in view of the DC's statutory breach.

[33] As the DB's decision on the DC's alleged breaches had already existed prior to the filing of the OS, it cannot be said that the court would have decided ahead of the statutory mechanism. It cannot also be said that the court has usurped the adjudicative function of the DB or DC as the court had never descended from the bench to determine the complaint on its merit.

[34] Considering the above precedents and deliberation, we hereby answer issue 1 in the NEGATIVE. The learned judge's refusal to grant the declaratory reliefs on the basis of the OS being premature was unfortunately misguided. Although the learned judge had in his mind the appropriate caution, the learned judge had unfortunately failed to consider other prevailing principles in the granting of declaratory relief and other salient facts of the OS which would put the OS within the realm of the exception to the general rule of non-intervention.

Issue 2: Whether Or Not The Learned Judge's Finding That s. 99(3A) Of The LPA Was A Non-issue Was Correct In Law

[35] The appellant and respondents are thoroughly at odds regarding the proper interpretation of the six-year time limitation prescribed under s. 99(3A) of the LPA. Intriguingly, the appellant and the respondents are all relying on the same provision to prove their own contrasting arguments. We reproduce the provision here for ease of reference:

> (3A) No complaint concerning the conduct of any advocate and solicitor or of any pupil **shall be inquired into** by the Disciplinary Board **after the expiration of six years from the date when the right of action to bring the complaint accrued** … (emphasis added)

[36] The appellant posited that s. 99(3A) of the LPA should be applied even against the inquiry by the DC and that the inquiry by the DC should be read as the inquiry by the DB. Thus, the appellant argued that the right of action accrues from the date of the impugned hearing and lapses six years from 4 November 2014 (last date being 3 November 2020). On that pretext, the appellant sought to prove that the inquiry called by the DC in the year 2021 was well beyond the six-year limitation period under s. 99(3A) of the LPA.

[37] On the contrary, the respondents argued that the provision if read in tandem with r. 6 of the Legal Profession (Disciplinary Proceedings) Rules 2017 would stipulate that the provision does not bar an inquiry by the DC to be made beyond six years after the accrual of right to action. Instead, the provision allegedly is more focused on the conduct of 'complaint' rather than 'inquiry'. Therefore, the respondents argued that the statutory time limitation is instead that a complainant would have six years from the right to action to lodge a complaint to the Bar Council and the DB inquiry can proceed even beyond the six-year time limitation so long as the complaint was lodged within six years from the right to action.

[38] The touted r. 6 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ("DP Rules") reads as follows:

> **No complaint** relating to the alleged misconduct of any advocate and solicitor concerned or the legal firm **shall be lodged by the complainant after the expiration of six years from the time when the right to bring the complaint accrued** or when the complainant first became aware of the act or the last of the acts complained of had occurred entitling him to lodge a complaint. (emphasis added)

[39] Now, even before we begin to address the substance of the parties' arguments, it is most prudent for us to first reconcile the contrasting interpretations that the parties had contended. To our analysis, it is plain and obvious that s. 99(3A) of the LPA **specifically refers to and limits the Act of inquiry by the DB, and not the act of lodging complaints.** (emphasis added). The provision expressly states that the DB shall not inquire into any complaints if six years have already passed since the accrual of the right to action. Thus, any supposition that goes against the clear pronouncement in the provision should be in contravention of the provision. Therefore, the provision clearly anticipates that both the complaint and the inquiry must be done within the six-year time limitation.

[40] To argue that the provision would allow six years for the complaint to be lodged, and further undetermined time beyond that six years for the DB inquiry would run contrary to the very essence as well as the purpose of the provision, and the mischief (as in delays) which the provision is designed to avoid.

[41] The respondents' reliance of r. 6 of the DP Rules only lends further credence to the appellant's interpretation of s. 99(3A) of the LPA. Rule 6 of the DP Rules stipulates that a complainant must lodge his complaint within six years from the accrual of the right to complain. This ties in properly with s. 99(3A) of the LPA as lodging a complaint beyond the six years stipulated under r. 6 of the DP Rules, would lead to a futile exercise as s. 99(3A) of the LPA would bar any inquiry to be made into such a complaint made out of time. The respondents' interpretation of both provisions would defeat the very same time limitation under s. 99(3A) of the LPA to bar inquiry out of time embedded within the provision. If we were to subscribe to the respondents' interpretation, then the six-year time limitation under s. 99(3A) would be meaningless.

[42] Thus, we preliminarily find that the proper interpretation of the six-year time limitation under both provisions should mean that the DB inquiry must be made within six years from the accrual of the right to action. It is the legal duty of the complainant to observe and timeously act on his right so that both the complaint and the DB inquiry can be done within six years from the accrual of the right to action. It is also the DB's statutory duty to timeously perform its functions within the time stipulations prescribed under the provision.

[43] Notwithstanding, our agreement with the appellant's interpretation is only to the above extent regarding the calculation of six-year limitation period. However, the appellant's contention to assume or infer that the inquiry by the DC is, by extension, the inquiry by the DB is unfortunately erroneous. The Legislators have appropriately arranged and charted the procession of investigations or inquiries to be done by separate bodies (being the DB and DC) in accordance with the distinct levels of investigation a particular complaint is currently at. If the Legislators have intended that the two inquiries be the same single inquiry, then the Legislators would not have made a clear contra-distinction between the inquiry by the DB and the inquiry by the DC in totally separate and distinct provisions and levels of investigation.

[44] Since the appointment of the DC in any given complaint is made upon the provisos under s. 103A of the LPA, then it can be clearly gleaned from the holistic reading of the LPA that the DB would have to embark on its own inquiry (prior to the appointment of the DC) before making a decision whether or not the appointment of the DC is necessary or otherwise. This inquiry by the DC is clearly separate and distinct than that of the inquiry of

the DB. Thus, to assume that the DC's call for inquiry in 2021 is the DB's inquiry under s. 99(3A) of the LPA is plainly wrong. This is especially telling considering that the LPA provides a specific provision under s. 100 of the LPA on the procedures the DB (not DC) should follow when dealing with a complaint made to the DB (not DC). It must clearly be minded that a written complaint does not at all go directly to the DC. A written complaint can only reach to the DC's investigation, only upon the DB's initial inquiry into the written complaint, and subsequent decision by the DB to embark on further investigation *via* the DC.

[45] Following our finding above, it naturally follows that we agree with the learned judge's finding that s. 99(3A) of the LPA was a non-issue as the DB's request to seek for a written explanation under s. 100 of the LPA, in the year 2016 was well within the limitation period of the provision. The learned judge has astutely found that the DB inquiry under the provision is separate and distinct to the DC inquiry which the DC had called for in 2021.

[46] All of the above considered, we answer issue 2 in the positive. The learned judge was correct to find that s. 99(3A) of the LPA was a non-issue to begin with as the DB inquiry in 2016 was conducted well within the six-year limitation period under s. 99(3A) of the LPA.

Issue 3: Whether Or Not The Learned Judge's Refusal To Grant Declarations Despite His Finding Of DC's Breach Of s. 103B Of The LPA Was Correct In Law

[47] We are minded that the factum of the four years and one month's delay was readily admitted by the respondents. The disputation then is on the proper treatment that should be given against the present appeal's instance of delay.

[48] The respondents were adamant that although the provision seeks to promote expediency in the respondents' functions under the LPA, the provision cannot be strictly or rigidly imposed against the respondents. The respondents vehemently relied upon the Court of Appeal case of *Koh Mui Tee v. Chin Lee & Ors And Another Appeal* [2014] 1 LNS 966; [2015] 1 MLJ 388 in which the Court of Appeal had dealt with an eight months' delay by the DC to furnish its report under s. 103F of the LPA to the DB partly caused by the many objections raised by the solicitor complained against ("*Koh Mui Tee*").

[49] In *Koh Mui Tee*, the Court of Appeal was lenient and amenable to absolve the delay primarily because of the following facts in *Koh Mui Tee*:

(i) the **provision itself allows for a statutory extension of time** that could be applied for by the DC if a report could not be furnished within the two-month time frame under the provision; and

A (ii) the delay was not inordinate and was explained by the DC. The **DC explained that part of the delay was also caused by the hands of the solicitor due to the many objections raised** by the solicitor which the DC had to address at the same time of preparing its report to be submitted to the DB. (emphasis added)

B **[50]** On the contrary, we are inclined to agree with the appellant's argument that the case of *Koh Mui Tee* ought to be distinguished with the present appeal. In *Koh Mui Tee*, the balance of justice might still tilt in favour of lenient reading of the statute's stipulations of time considering the facts above. Inversely, the *factum* of delay and the relevant provision dealt with C in the present appeal are entirely different and distinguishable from *Koh Mui Tee:*

(i) the length of delay in *Koh Mui Tee* is a mere **eight months**. However, the length of delay in the present appeal is a startling **49 months (four years and one month)**. It is far too presumptuous to liken the D prejudice caused against the appellant and the inordinate nature of the 49-months' delay to be the same as *Koh Mui Tee*'s **mere eight-month delay**;

(ii) in *Koh Mui Tee*, **the delay was appropriately explained** by the DC that it was **also occasioned by the solicitor's own barrage of objections.** E Altogether different from *Koh Mui Tee*, the respondents in the present appeal did not at all provide any explanation as to the 49-month delay since the appointment of the DC; and

(iii) the provision in *Koh Mui Tee* readily provides a mechanism for F extension of time. Thus, it was within the Legislator's intent and anticipation that the time stipulation within the provision should be given a degree of flexibility. However, **s. 103B of the LPA does not at all provide any statutory rights for extension of time.** Thus, the Legislators must have specifically intended s. 103B of the LPA to be G applied with a higher degree of strictness and compliance. (emphasis added)

[51] We agree with learned counsel for the appellant that the four years long unexplained delay had put the appellant in a long state of limbo and distress over the firm's uncertain fate.

H **[52]** It is only fair and just that the appellant not be put in a prolonged state of suspense and dragged through years of uncertainty. Especially considering the nature of the appellant's practice as a law firm, it is only just for the appellant be given prompt opportunity to defend the firm's reputation and integrity.

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[53] On the same note, it is also in the best interest of the appellant's clients and prospective clients in the public to know with certainty the reputation and integrity of the solicitors they have appointed or intend to appoint. We are guided by the salutary words of the Supreme Court in the case of *Majlis Peguam Malaysia & Ors v. Joseph Au Kong Weng* [1993] 2 CLJ 417; [1993] 2 MLJ 57:

> *It appears to us that a reading of the timetable provided under ss. 93-103 with regard to disciplinary proceedings under Pt V of the Act, the expeditious disposal of complaints is what is sought to be enforced by the Act in providing for safeguards against delay, in order to ensure that an innocent advocate and solicitor, clears himself of any stain or suspicion of misconduct as soon as possible or conversely, that a guilty advocate and solicitor, is dealt with, as soon as possible, in the public interest.* The very object of expeditious disposal of complaints under the Act would be defeated if the steps to be taken consequent thereto could be treated casually and lightly. This is the first impression we get on reading the provisions concerned and we are thus reminded of the well-known *dictum* of Denning MR in *Sheffield City Council v. Grangers Wines Ltd* 13 at p. 1122 that whether a particular provision is to be treated as mandatory (or imperative) or directory 'is always a matter of impression'.
>
> On general principle, where a statute regulates the exercise of a right or power, or the use of a prescribed procedure, *express reference to time being made, there is a marked inclination on the part of the court to regard the relevant provision as one which must be strictly and meticulously followed out.*
>
> (emphasis added)

[54] Considering the nature of the complaint involved and the years' worth of inexplicable delays by the DC, we are also inclined to refer to the Court of Appeal decision in the case of *Sundarajan Sokalingam v. Fredrick Indran XA Nicholas; Badan Peguam Malaysia (Intervener)* [2015] 4 CLJ 892; [2015] MLJU 2327 in which the High Court dealt with a delay of two years and seven months (31 months).

> [15] Section 103B of the LPA ("section 103B") effective 03/06/2014 provides:
>
> > *(1) The Disciplinary Committee shall, WITHIN ONE MONTH of ITS APPOINTMENT, COMMENCE ITS INQUIRY into the written application or complaint and shall make its findings expeditiously.*
> >
> > *(1A) The Disciplinary Committee shall keep a note of the proceedings of the inquiry and submit the findings and the notes of the proceedings to the Disciplinary Board.*
>
> [16] Although prior to 03/06/2014 the section did not impose a requirement that the DC submits its findings and recommendations expeditiously, we make the following observations:

(a) *The nature of the Appellant's conduct demanded that action be taken quickly and firmly while the event was fresh in the minds of everyone, so that there is no uncertainty as to the rejection and condemnation of such conduct. With the delay of 2 years and 7 months, the event had begun to recede into the pale mists of time.* In the meantime, except for the period of 6 months when the Appellant served a sentence of imprisonment, the Appellant continued to practice. The delay was very much longer than the period of suspension recommended by the DC, and the period of suspension imposed by the Respondent. The reduction, upon appeal, to 6 months' suspension added to the impression that the conduct was only mildly disapproved.

(b) Had the findings and recommendations been made within a reasonable time considering the gravity of the incident, and even assuming that the DB imposed punishment of 12 months' suspension from practice, it is arguable that the 6 months' suspension by the High Court, his term of imprisonment from 22/2/2011 could have coincided with at least part of the period of suspension. Delayed, the Appellant faced the prospect of suffering 6 month's suspension in addition to the period he was unable to practice when serving his sentence of imprisonment. This alone would not be sufficient in our view to set aside the suspension of 6 months imposed by the High Court. *More to the point was the lack of an acceptable explanation for the delay of almost 2 years 7 months.*

[17] It was submitted by the Intervener that the delay was technical, since at all times, except during his period of imprisonment, the Appellant had continued to practice, he had suffered no prejudice whatsoever. We find no merit in this submission which originates from procedural time limits (see Order 1A of the Rules of Court 2012). *It cannot be applied to ignore or override time periods set down by statutory provisions. Although the section did not and still does not set down any fixed time, it requires explanation when on the face of it there was a delay and the matter was one that required a firm and timely response.* (emphasis added)

[55] We are minded that the learned judge had already found that the DC's delay was inordinate and inexplicable and that it would be a cogent ground for the appellant to contend on the time lapse under s. 103B of the LPA. Limited to this extent, we are in agreement with the learned judge.

[56] However, despite the above finding, the learned judge still refused to allow any injunctive or even declaratory relief to the appellant on the same ground of premature action (which we already have expressed our disagreement against in our answer to issue 1 above). Thus, the learned judge still unfortunately fell into error in failing to outright declare the clear breach of s. 103B of the LPA by the DC and the unlawfulness of the DC Inquiry for being four years and one month out of time. We hereby answer Issue 3 in the negative. The learned judge had erred when he refused to grant declarations despite his finding of the DC's breach of s. 103B of the LPA.

Our Decision

[57] Considering all of the above deliberations, we hereby allow the present appeal to the extent of the following. We firstly set aside the entirety of the learned judge's decision to dismiss the appellant's OS. The appellant's OS is hereby allowed specifically for and limited to the declarations under prayers 1(g) and (j) of the OS. We hereby declare the following:

(i) that the act of convening an inquiry by the third defendant on the appointment by the second at this juncture is illegal, void, and of no effect as there has been a breach of mandatory provision of s. 103B(1) of the LPA; and

(ii) that the disciplinary proceedings instituted by the second defendant against the plaintiff were therefore illegal, null, and void.

[58] Considering the mutual agreement between learned counsels of the appellant and respondents during the hearing before us, there is no order as to costs.